Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1979

Docket No. 79-1048

State of Minnesota,

Respondent,

vs.

Jeffrey E. Carlson,

Appellant.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

KURZMAN AND MANAHAN

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

THE AUTHORITIES CITED BY APPELLEE IN HIS MOTION TO AFFIRM ARE NOT APPLICABLE IN THIS APPEAL.

The issue presented by the appellant for consideration by this Court is whether cocaine was properly scheduled for penalty purposes as a Class II controlled substance under Minnesota Statute Section 152.02, Subd. 3(1)(d). Appellant asserts that cocaine should properly be scheduled as a Class III, IV or V controlled substance with a correspondingly lesser penalty.

The cases cited by appellee in his Motion to Affirm relate back to the reasoning set forth by this Court in United States v. Carolene Products Company, 304 US 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938), for their starting proposition establishing burdens of

persuasion and concluding that the various Defendants had not met their burden in mounting a Constitutional challenge to the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title XXI, United States Code, Section 801 et seq.

In Carolene, this Court recognized that,

> The Constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, althouth within the prohibited class, is so different from others of the class as to be without the reason for the prohibition.

At page 154. In the instant case, the record shows that there were no determinations by the State Legislature directly or by any other properly constituted body to which this

responsibility was delegated with respect to the classification of cocaine for penalty purposes as a Class II controlled substance. Thus, although the Minnesota Statute is similar to the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title XXI, United States Code, Section 801 et seq., the record before the Courts in Minnesota show conclusively that there was never a determination with respect to the effects of cocaine in the enactment of this Minnesota statute. Thus, under Carolene, there never was a inquiry of the level Constitutionally required before the enforcement of the Statute could lie. Further, the record established conclusively that cocaine is significantly dissimilar to the other substances placed in Class II.

It is appellant's contention that this case presents a properly justiciable issue of sufficient substance and in the context of "drug legislation," is clearly distinguished from the adverse Federal caselaw cited by Appellee, both from the perspective of the issues raised and with the record making this particular challenge one of "first impression."

Respectfully submitted,

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and

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